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No. 00-

IN THE

Supreme Court of the United States

ROBERT BROOKS,

Petitioner,

v.

CITY OF OAK RIDGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Sixth Circuit Court of Appeals err in holding, as a matter of law, that a Buddhist bell, permanently installed and displayed in an Oak Ridge, Tennessee Community Park is not offensive to the establishment clause of the United States and Tennessee Constitutions? More specifically, did the court err in holding that an explanatory plaque located along the path leading to the bell display, which claims a secular purpose, redeems this otherwise religious symbol from violating the establishment clause of the United States and Tennessee Constitutions?

II. Did the Appellate Court incorrectly determine that this permanent display of a clearly religious symbol is not governmental endorsement of Buddhism?

III. Did the Sixth Circuit Court of Appeals incorrectly find that the permanent display of this Buddhist religious symbol does not constitute impermissible governmental entanglement with religion?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Robert Brooks v. City of Oak Ridge*, 2000 FED App. 0243P (6th Cir. 7/21/00) is set forth in the Appendix attached to this petition (App. 1a-15a).

The Memorandum of Decision of the District Court for the Eastern District of Tennessee at Knoxville in *Robert Brooks v. City of Oak Ridge*, case number 3:98-cv-99 is unreported but is set forth in the Appendix attached to this petition (App. 16a-29a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court of the Eastern District of Tennessee was entered on September 14, 2000 on a denial of Appellant's petition for rehearing en banc (App. 30a-31a). This Petition for Writ of Certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> **Religious and political freedom** — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press;

or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Tennessee Constitution, Article 1, Section 3:

> **Freedom of Worship** — That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

STATEMENT OF THE CASE

This case began with a complaint filed by Robert Brooks on February 19, 1998, alleging a constitutional violation of the establishment clauses of the United States and Tennessee Constitutions. The basis of the complaint is the use of city property for the permanent display of a large bronze Buddhist bell. The defendant, City of Oak Ridge, answered the complaint, denying that the Oak Ridge bell is a Buddhist bell and therefore is not offensive to the establishment clauses of our State and Federal constitutions.

The defendant, City of Oak Ridge, filed a motion for summary judgment, supported by extensive evidence, including deposition excerpts, an affidavit, photographs, correspondence, and other documentary evidence, legislative resolutions, a video tape, and a literary work on the subject

of Buddhism. The plaintiff/petitioner filed a response, including his own motion for partial summary judgment, with supporting evidence, including the affidavit of our expert witness, photographs, documentary evidence, published materials and literature, and newspaper reports. Without oral arguments, the district court granted the defendant's motion for summary judgment, and overruled the partial summary judgment motion of the plaintiff. An order was filed dismissing the plaintiff's complaint on March 17, 1999.

The appellant filed a Motion to Reconsider with supporting evidence which was also denied. An Appeal was properly and timely perfected to the Sixth Circuit Court of Appeals in Cincinnati which resulted in a split opinion holding that the bell was a religious artifact or symbol, but that an explanatory plaque expressing a secular purpose redeemed the bell from offending the Federal and State constitutions (App. 3a-4a). Petitioner/Appellant timely filed a Petition for Rehearing en banc with the Sixth Circuit Court of Appeals which was denied by court order filed on September 14, 2000.

The basic and essential facts of this case were not disputed by the parties. The dispute centers around the inferences and conclusions to be drawn from the undisputed facts. While all the facts were not completely developed, since this case was disposed of by summary proceedings, we agree that the case was suitable for partial summary disposition on the facts which were presented and developed below. We believe that the Sixth Circuit Court of Appeals was in error sustaining the summary dismissal of the complaint by the district court. As found by the United States Court of Appeals, the evidence was compelling that the Oak Ridge bell is a Buddhist bell which carries important and

significant religious symbolism in the Japanese practice of Buddhism. Oak Ridge, the home of Oak Ridge National Laboratory, manufactured the uranium used in the atomic bombs dropped on the cities of Nagasaki and Hiroshima, Japan, during World War II. As can be seen from the evidence, one of the principal proponents of the Oak Ridge bell was Dr. Herman Postma, a retired director of Oak Ridge National Laboratory, and Chairman of the Bell Committee, which was formed for the purpose of developing this permanent religious display.

The first item of evidence relied upon by the city of Oak Ridge in support of its position was an affidavit of Dr. Herman Postma, Chairman of the Bell Committee. The defendant has sought to disassociate itself with the public statements of another Chairman of the Bell Committee, Dr. Alvin N. Weinberg, also a retired director of Oak Ridge National Laboratory. These statements are quoted in pertinent part in our motion for partial summary judgment, and may be found in the appendix to this petition (App. 32a-35a). These public statements, which were authored by Dr. Weinberg in a newspaper column, speak volumes about the religious symbolism of the Oak Ridge bell. As can be seen, Dr. Weinberg compares the Oak Ridge bell to the Hiroshima Peace Park bell in Japan. He notes that the Hiroshima bell becomes "sort of a shrine (perhaps like Bethlehem or Mecca)" on the anniversary of "The Great Killing."

Dr. Weinberg says that even on an ordinary day, the Hiroshima Peace Park has a "sort of religious feel." People leave paper birds as they do at "other Japanese shrines." People "walk about quietly and they talk in subdued tones." He poses the following question: "Could it be that the awful

event of August 6, 1945, is in fact being transformed into a religious event? Is Hiroshima becoming sanctified?"

Dr. Weinberg says that nuclear weapons are so horrible, that to prevent their future use, we must surround them with religious taboos. He compares the bombing of Japan to the Cruxification and "the Jewish Holocaust which is now observed in Jewish liturgy." He says that "Oak Ridge, as well as Hiroshima, should be sanctified." The shrine at Hiroshima should "be replicated at Oak Ridge." The Oak Ridge bell should "acquire the same kind of transcendental, religious character as the Hiroshima bell." (App. 35a).

The religious symbolism of the Oak Ridge bell and our resulting objections to it, on constitutional grounds, could not have been more eloquently stated. This aspect of the Oak Ridge bell controversy is sometimes referred to as the "apology controversy." (Apology for the Japanese atomic bomb victims). This issue is inextricably bound to the religious symbolism of the bell which has been so articulately described by Dr. Weinberg. The defense has dismissed Dr. Weinberg's comments by characterizing them as the views of a private citizen, a disingenuous denial of the clear and inescapable religious message of the Oak Ridge bell by the Honorary Chairman of the Bell Committee. This particular aspect of the case was addressed by the Sixth Circuit Court of Appeals in declining to read the establishment clause broadly enough to include the official expression of sentiment that may have a religious counterpart (*Brooks v. City of Oak Ridge*, 6th Cir., p. 8-9, App. 10a).

Another striking feature of the Oak Ridge bell, which the Sixth Circuit found "troubling" is the history of its manufacture. The bell was cast by a religious bellmaker in

Japan with a traditional Buddhist ceremony that accompanies the casting of every Buddhist temple bell. As described in the Sixth Circuit's Opinion, a Buddhist monk presided over the affair, chanting Buddhist prayers. Objects, including prayers written on paper were thrown into the molten metal. The ceremony was a cultural tradition that was necessary to impart "soul into the bell." At one point the observers which included supporters of the bell project, were invited to pray. (6th Cir. Opin. p. 4-5, App. 4a-5a).

The significance of this ceremony has been unsuccessfully and disingenuously denied by the city of Oak Ridge both through its witnesses and its pleadings. Admitting the ceremony and all of its religious connotations, the city of Oak Ridge has vigorously denied that this ceremony was a Buddhist ritual, which casts suspicion on the successful claim of Oak Ridge that the purpose of the bell was secular, and therefore not offensive to the constitution.

As observed in the Sixth Circuit Opinion, the Oak Ridge bell, like Buddhist temple bells, has a distinctive size, shape, method of percussion, and images molded into the bell, all of which are very similar to Japanese Buddhist temple bells. Many such bells contain 108 knobs symbolizing the traditional Japanese practice of ringing the Buddhist temple bell 108 times on New Year's Eve to atone for the 108 sins or shortcomings of mankind. As observed by the Sixth Circuit, our expert, Dr. Steven Heine, professor of Eastern Religious Studies, testified that the sound of the bell is like a mantra or a chant, which conveys the unity of the Cosmos, or in this case, the oneness of the Buddha. The bell is strongly associated with Buddhist Monasteries. The shape of a bell is used to indicate the location of Buddhist temples on a map, much as the Christian cross indicates the location of churches. Souvenir bells are often sold at or near Buddhist temples (6th Cir. Op. p. 6&7, App. 7a-8a).

The Sixth Circuit's opinion also quotes many other religious sources independently consulted by the court. Clearly, and correctly, the Sixth Circuit determined that the bell was closely tied to the Buddhist religion as a ritual implement invested with symbolic significance. The court therefore determined that it was appropriate to apply the *Lemon* test to the permanent display of this Buddhist bell.

The court had little difficulty in concluding that the permanent display of this religious symbol was secular. The primary basis for this legal conclusion is an explanatory plaque that is located on a trail some distance from the bell house. This plaque is quoted on page 3 of the Court's Opinion (App. 3a-4a). We believe this is the most important aspect of the case as far as this court is concerned. In reviewing the cases dealing with religious displays, we have seen several instances where an explanatory plaque has redeemed a clearly religious object from offending the constitution. *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992). It seems to us that any religious object displayed on governmental property can be "plaqued" out of the constitution. This, to us, seems fundamentally offensive to the provisions against the establishment of religion, since any creative mind can come up with a secular statement of purpose for an otherwise religious object. We know that attempts have recently been made to do that regarding the Ten Commandments, as well as other religious freedom cases. If this Court allows a simple statement of secular purpose to remove an otherwise religious object from the constitution, then permanent religious symbols can be erected by any group with sufficient political influence to persuade the government to allow the use of public property for this purpose. The constitution should not allow a religious object to be converted into a secular one by a plaque.

The Sixth Circuit also found that there was no excessive governmental entanglement with this permanently displayed Buddhist bell, and largely ignored our evidence, confirmed by the defendant's own exhibits. This evidence shows there has been considerable controversy regarding responsibility for maintenance, upkeep, security, landscaping, parking, lighting, and modifications to the park to accommodate the bell display. Many other issues are discussed in these exhibits, establishing the current as well as the long term future involvement between the city government and the bell. The bell has been proudly described as having a expected life of one thousand years, which means that the government will have responsibility for this religious display for the next millennium.

From the established and uncontroverted facts, and as correctly found by the Sixth Circuit Court of Appeals, it is obvious that the Oak Ridge bell is a Buddhist bell. The Japanese Buddhist bell is a religious object of considerable significance in the practice of Japanese Buddhism. It is surrounded by a long and rich history of stories, legends, ceremony and ritual. It identifies a Japanese Buddhist temple as clearly as the Christian cross identifies a church. It is an instrument of prayer, atonement, and worship.

The public debate and controversy surrounding the Oak Ridge bell, which is well documented in this record, clearly establishes that the proponents of the bell were well aware of the community's strong and substantial objections. The record of this public debate establishes the religious component of those objections, and the efforts of the proponents of the bell to avoid or ignore those objections. The central question raised by the appeal, and this petition, is whether the peace and friendship theme of the Oak Ridge

bell has changed the fundamental religious character of this important Buddhist religious artifact. We believe the answer to this question should be no. The theme of the Oak Ridge bell is inherently religious - atonement for the atomic bomb victims of Japan, and it should not be allowed to be permanently displayed on public property.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW MISAPPLIES THE FIRST PRONG OF THE *LEMON* TEST SET OUT IN THIS COURT'S OPINION IN *LEMON v. KURTZMAN*, 403 U.S. 602 (1971) BY ACCEPTING OAK RIDGE'S CLAIM OF A BENIGN SECULAR PURPOSE REGARDING THIS BUDDHIST BELL.

As correctly determined by the Sixth Circuit Court of Appeals, Oak Ridge has asserted a theme of peace and friendship as the purpose of the bell which is echoed in an explanatory plaque "that accompanies the bell display" (6th Cir. Opn., *Brooks v. Oak Ridge*, p. 8 (App. 3a-4a)). The Sixth Circuit relies upon the case of *Chaudhuri v. State of Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997), *cert denied*, 523 U.S. 1024 (1998), as further support for its holding. While the Court did not cite *Chaudhuri* on its facts, it should be remembered that *Chaudhuri* involved non-sectarian prayers which were not identifiable to any particular sect or religion. The stated secular purpose was that the prayer was a traditional exercise memorializing a public event. The factual context of *Chaudhuri* is clearly distinguishable from this case since the Buddhist bell in the Oak Ridge Park is clearly denominational.

The Sixth Circuit also stated that it had no reason to believe that Oak Ridge's asserted purpose was a sham. While acknowledging the evidence we submitted in support of a contrary purpose, in a footnote, the Court of Appeals stated that Dr. Wineberg's article was not properly before the court, and presumably was therefore not considered. This finding is clearly incorrect. Dr. Weinberg's self authored article was contained in the joint appendix, and has been included in the appendix to this petition, directly excerpted from the joint appendix filed in the Sixth Circuit. As can be seen from this article, the religious connotations of the Buddhist bell, from the Honorary Chairman of the Bell Committee, are explicitly described. Proponents of the bell in Oak Ridge clearly intended to create a counterpart to the Hiroshima peace park bell, which is unquestionably a Buddhist religious shrine. To ignore this extremely persuasive evidence of the religious character of the Oak Ridge bell in summary judgment proceedings is inappropriate. It casts serious question on the legitimacy of Oak Ridge's claim that the purpose of the Buddhist bell in Oak Ridge is secular.

The Sixth Circuit also rejected our argument that symbolic atonement to Japan for Oak Ridge's role in World War II was tantamount to a religious purpose, declining to interrupt the establishment clause so broadly. It must be remembered that this symbolism was not our idea. The religious quality of the atonement aspect of the Oak Ridge bell was articulated by a principal proponent of the bell project, not Mr. Brooks. This is part of what caused the extensive controversy that is well documented in the record by the people of Oak Ridge concerning the installation of this bell on public property. The Sixth Circuit cited the case of *Alvarado v. San Jose*, 94 F.3d 1223 (9th Cir. 1996).

That case involved a statue in a park which was described as a "plumed serpent," which was claimed to be some obscure historical religious symbol. Surely that is not equivalent to Buddhism, a well recognized and widely practiced religious sect.

II. THE OPINION BELOW INCORRECTLY DETERMINED THAT THE OAK RIDGE BUDDHIST BELL DID NOT HAVE THE EFFECT OF ENDORSING RELIGION, HOLDING THAT THE OVERALL EFFECT OF THE BELL WOULD NOT BE SEEN BY A REASONABLE OBSERVER AS AN ENDORSEMENT OF BUDDHISM.

One of the cases relied upon by the Sixth Circuit in reaching this conclusion was *Kunselman v. Western Reserve Local Sch. Dist.*, 70 F.3d 931, 932 (6th Cir. 1995). Like *Alvarado*, cited above, *Kunselman* involved a symbol which could not be reasonably construed as religious, a blue devil school mascot. Again, it cannot be seriously argued that a blue devil that is used by a school as a mascot is equivalent to a Buddhist bell.

The court below relies upon the explanatory plaque, in large part, to negate any religious endorsement that might otherwise be present, citing, among other cases, *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992). Unlike the Oak Ridge Buddhist bell, the Menorah display in *Americans United* on public property during Chanukah was temporary; and the sign disclaiming endorsement of religion by the government was placed much more conspicuously to the Menorah than the explanatory plaque in this case. As can be seen from photographs contained in the joint appendix, and included

in this petition (App. 36a-37a), the explanatory plaque in this case is some distance from the bellhouse in Oak Ridge. The casual observer does not necessarily pass by the plaque to visit the Oak Ridge bell. Also, there is no disclaimer of endorsement of religion by the local government as can be seen from the words inscribed on the plaque quoted on pages three and four of the Sixth Circuit Opinion (App. 3a-4a).

The Sixth Circuit cited two other cases to support its holding that the Oak Ridge bell did not endorse religion, *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990); and *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). Each of these cases turned upon an important finding regarding the disclaimer sign which accompanied the otherwise religious displays. In *ACLU* the display was a fifteen foot high stable on the State Capitol grounds during the 1988 Christmas Holiday season. The *ACLU* sought an injunction which was denied by the district judge, provided that the government prominently display a sign advising the public that the area was a public forum available to civic and religious groups for ceremonies and displays. The disclaimer was required to be in letters large enough to be read from an automobile passing on the street, very similar to the disclaimer sign posted in front of the Menorah in *Americans United* cited above. The Sixth Circuit, in a divided opinion found that the unequivocal and conspicuously posted disclaimer was critical to dispel any message of governmental endorsement. Importantly, there is no disclaimer in this case, and the explanatory plaque cannot be seen from the street nearest the bell; nor can it be seen by someone standing directly in front of or beside the bellhouse. As can be seen in the photograph referred to earlier in this petition, the plaque is located a short distance from the bellhouse along a walking trail; and it contains absolutely no disclaimer of

governmental endorsement of religion. It is also distinguishable from the *ACLU* and *Americans United*, cases cited above, in that the display is permanent rather than temporary.

In *Capitol Square* cited above, Justices O'Connor, Souter, and Breyer, in a separate concurring opinion, found that an adequate disclaimer which was to accompany the display was of some importance in resolving the endorsement issue, *Capitol Square v. Pinette*, 515 U.S. 753, 782. Also, at issue in the *Capitol Square* case was a temporary display (a Latin Cross placed by the Ku Klux Klan); and the location of the display was a traditional public forum where many private groups were allowed display political and religious messages, a situation clearly different from the one involved in this case.

It is clear from the Sixth Circuit Opinion in this case that the decision was a close one. The court found the religious ceremony accompanying the manufacture of the bell "troubling," and the concurring opinion even questions whether the bell is a religious Buddhist symbol at all.

III. THE SIXTH CIRCUIT INCORRECTLY DETERMINED THAT THERE WAS NO IMPERMISSIBLE GOVERNMENTAL ENTANGLEMENT WITH RELIGION, HOLDING THAT THE PROVEN POLITICAL DIVISIVENESS, MAINTENANCE, AND LAWS AGAINST THE RINGING OF THE BELL WERE INSUFFICIENT TO CONSTITUTE EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION.

These holdings are not only inconsistent with the facts which were before the court, they are also inconsistent with the cases relied upon to support the propositions of law that apply to these types of cases. It is clear from the exhibits contained in the joint appendix that there was considerable controversy regarding expenses associated with the maintenance, upkeep, security, landscaping, parking, lighting, and modifications to the park to accommodate the bell. One of the many controversies involves a service contract regarding financial support for the administrative cost associated with the bell. Another of the defendant's exhibits talks about the expenses of relocating a pedestrian bridge in the park to accommodate the bell display. These same exhibits address questions of installation, site work, off street parking, extension of walking trails, moving the bridge abutment, relocating a foot bridge, Japanese landscaping, anti-vandal systems, trash removal and other park related services. In light of the fact that the bell is expected to last for up to a thousand years, governmental involvement in the bell is no small matter. It is also clear from the record in this case that all future obligations with respect to the bell will be the government's responsibility and not private resources.

In addition to these financial and upkeep obligations, the city of Oak Ridge has passed an ordinance which is discussed in the Sixth Circuit Opinion. This ordinance prohibits the ringing of the bell allegedly because of concerns regarding noise. Apparently, the Sixth Circuit has accepted this stated reason, without question, in the face of overwhelming evidence of the controversy surrounding the bell.

In October of 1997 there was a public controversy over the ringing of the bell by eleven Japanese national women who were the guests of one of the principal proponents of the bell, and a witness in this case. Evidence of this event and the ensuing public controversy was placed into the joint appendix. This evidence clearly shows that the history of the bell controversy included considerable public concern that the bell would be utilized as a shrine to Hiroshima, as described by Dr. Wineberg in his article. Concern was also expressed that the bell might be rung ceremonially on Hiroshima day, as proposed by the designer of the bellhouse.

This evidence clearly establishes the controversy surrounding the Oak Ridge bell is much larger than is apparent from reading the Sixth Circuit Opinion. The evidence referred to above clearly demonstrates that the city ordinance restricting the ringing of the bell is not merely because of concern over excessive noise. The concern is over excessive controversy. Otherwise the ringing of this benign friendship bell would not produce public controversy and a front page newspaper article in Oak Ridge. The controversy in this case does not support the finding that there is no governmental entanglement with the Buddhist religion.

In our Petition for Rehearing en banc, we brought to the Sixth Circuit's attention some additional evidence bearing on this ordinance against the ringing of the bell. On December 31, 1999 at 10:00 o'clock a.m., Dr. Postma, Chairman of the Bell Committee, and a group of individuals, gathered to ring the Oak Ridge bell pursuant to a resolution obtained by Dr. Postma from City Counsel permitting an exception to the ordinance against the ringing of the bell. As noted in our petition for rehearing, 10:00 o'clock a.m. Eastern Standard Time, on December 31, 1999, is 12:00 Midnight on New Year's Eve in Tokyo, Japan. This is significant, because, as noted in the Sixth Circuit Opinion, a popular Buddhist ritual is the New Year's service where the Buddhist temple bells ring 108 times, signifying the 108 kinds of blind passions that must be purified in the coming year (6th Cir. Op., *Brooks v. Oak Ridge*, footnote 3, page 6 and App. 7a-8a).

In its entanglement analysis, the Sixth Circuit cited the case of *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). *Coles* involved school prayer at the opening of meetings of the Board of Education. These were disallowed on the grounds that such a practice constituted governmental endorsement or entanglement with religion in violation of the First Amendment. Factually, the case is different, but it may be of some importance in demonstrating the point that school prayer can offend the First Amendment even when it does not involve coercive participation by the student body. As we all know, decisions regarding school prayer at school events have been handled differently by different courts, casting further doubt on the consistency of resolution of First Amendment cases.

The opinion below also relies on the case of *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert denied*, 479 U.S. 939 (1986). The *ACLU* case involved a nativity scene on public property which was found to be a violation of the First Amendment. As can be seen from a review of the cases relied upon by the Sixth Circuit, there are no opinions in this area of the law involving the permanent display of a religious implement from a well recognized and widely practiced religious sect on public property. The facts of this case present a unique legal question, which is not easily resolved by the other legal precedents in this area of the law.

The State Constitutional Challenge

The court below recognized that the Tennessee Constitution guarantees a stronger free exercise right than the federal Constitution, citing the Tennessee case of *Martin v. Beer Bd*, 908 S.W.2d 941 (Tenn. Ct. App. 1995). A simple comparison of the state and federal Constitutional provisions clearly demonstrates that the state provision is stronger than its federal counterpart. Unfortunately, the Sixth Circuit rejected our state claim on the ground that we cited no judicial opinions from Tennessee holding that the state Constitutional provision provided for a stronger Establishment Clause than the federal Constitution. The problem with that analysis is there are no Tennessee cases construing Article I of the state Constitution.

It should be clear, however, that the state Constitutional provision is stronger in every respect than the federal Constitution. The Tennessee Constitution, in unambiguous language, states that "no preference shall ever be given, by law, to any religious establishment or mode of worship."

The Sixth Circuit recognized that the Tennessee Constitution guarantees a stronger free exercise right than the federal Constitution, but declined to make a similar finding with respect to the Establishment Clause of the Tennessee Constitution based on the absence of any judicial decisions in this area of the law. It seems to us that this is an inappropriate reason for refusing to construe the obviously more restrictive provision of the Tennessee Constitution. Every new judicial precedent begins with the first opinion, and this should not serve as an excuse for a court to avoid construing the clear language of our Tennessee Constitution.

CONCLUSION

This case presents a unique opportunity for this court to address the permanent display of a religious object on public property. It also presents a unique opportunity for the court to review an establishment case regarding a religious object from a well recognized religion, but one which is not widely practiced in the United States. One must ask whether there is or should be a double standard for such religious artifacts. We think the answer to that question should be no, and, at a minimum, there are legitimate factual questions regarding the claimed motives of the proponents of the Oak Ridge bell regarding its purpose. As found by the Sixth Circuit, there can be no serious question that the Oak Ridge bell is indeed a Buddhist bell, and that such is a significant religious implement in the Buddhist religion. The factual question remains, however, whether or not the proponents of the bell intended to establish a religious shrine as a counterpart to the Buddhist Hiroshima Peace bell in Japan.

We believe there is significant evidence to support this finding, and it is inappropriate to summarily dismiss this claim on such disputed factual evidence. We urge the court to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED JULY 21, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-5516

ROBERT BROOKS,

Plaintiff-Appellant,

v.

CITY OF OAK RIDGE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 98-00099 — James H. Jarvis, District Judge.

Argued: March 16, 2000

Decided and Filed: July 21, 2000

* * *

Before: NORRIS, MOORE, and COLE,
Circuit Judges.

* * *

Appendix A

MOORE, J., delivered the opinion of the court, in which COLE, J., joined. NORRIS, J., delivered a separate opinion concurring in the result.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-appellant Robert Brooks, a citizen of Oak Ridge, Tennessee, brought suit against the defendant-appellee, the City of Oak Ridge ("Oak Ridge"), alleging that the "Friendship Bell" erected in a public park on the fiftieth anniversary of the city's founding is a Buddhist symbol whose presence results in an endorsement of the Buddhist religion, in violation of the Establishment Clauses of the U.S. and Tennessee Constitutions. U.S. CONST. amend. I; TENN. CONST. art. I, § 3. The district court granted summary judgment to Oak Ridge. Finding no constitutional violation in the city's use of the Friendship Bell, we **AFFIRM**.

I. BACKGROUND

In order to celebrate the fiftieth anniversary of the City of Oak Ridge, the Oak Ridge Community Foundation ("Foundation"), a private non-profit corporation constituted by Oak Ridge citizens, solicited proposals for a commemorative project and ultimately chose the display at issue in this case. The design for the commemorative "Friendship Bell" was submitted and developed by two Oak Ridge citizens, neither of whom was a Buddhist. Described in the Foundation's brochure as honoring the Oak Ridge citizens who worked on the Manhattan Project during World War II, demonstrating the historical link between Oak Ridge and Japan, and expressing hope for future peace and

friendship among nations,[1] the large, bronze Friendship Bell bears a strong resemblance to the bells that are found in Buddhist temples. Weighing four tons, the bell measures approximately six and one-half feet tall and four and one-half feet in diameter. On the exterior of the bell are 108 knobs and two large panels bearing images associated with Japan and Tennessee, including the official flowers, birds, and trees of each. The surface of the bell is inscribed with the following words: "International Friendship," "Peace," "Pearl Harbor, December 7, 1941, VJ Day, September 2, 1945," and "Hiroshima, August 6, 1945, Nagasaki, August 9, 1945." J.A. at 23 (Postma Aff.), 41-42 (Photographs of Bell). The bell is accompanied by a large wooden striker and by a plaque containing these words:

FRIENDSHIP BELL

THIS BRONZE BELL WAS DESIGNED IN OAK RIDGE AND CAST IN JAPAN IN 1993 TO SERVE AS A SYMBOL OF THE BONDS OF FRIENDSHIP AND MUTUAL REGARD THAT HAVE DEVELOPED BETWEEN OAK RIDGE AND JAPAN OVER THE PAST FIFTY YEARS .... FRIENDSHIP MADE SO MUCH MORE MEANINGFUL BECAUSE OF THE TERRIBLE CONFLICT OF WORLD WAR II WHICH OAK RIDGE PLAYED SUCH A

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1. The city of Oak Ridge was created in 1942, when President Roosevelt designated the area where the town now sits as the site of the "Manhattan Project," which resulted in the building of the two atomic bombs that were deployed by the United States in World War II.

Appendix A

SIGNIFICANT ROLE IN ENDING. THIS BELL FURTHER SERVES AS A SYMBOL OF OUR MUTUAL LONGING AND PLEDGE TO WORK FOR FREEDOM, WELL-BEING, JUSTICE, AND PEACE FOR ALL THE PEOPLE OF THE WORLD IN THE YEARS TO COME.

The following words appear in a smaller font:

GIVEN TO THE PEOPLE OF OAK RIDGE ON THE OCCASION OF THEIR 50TH BIRTHDAY BY THE OAK RIDGE COMMUNITY FOUNDATION AND FRIENDS IN THE UNITED STATES, JAPAN, AND OTHER NATIONS

1996

OAK RIDGE, TENNESSEE
BORN OF WAR, LIVING FOR PEACE, GROWING THROUGH SCIENCE

J.A. at 43 (Photograph of Plaque).

The bell, which was paid for through contributions raised by the Foundation, was cast in Kyoto, Japan and shipped to Oak Ridge. A number of Oak Ridge citizens associated with the bell project traveled to Japan in order to observe the casting ceremony, including city councilman Ed Nephew. In his deposition testimony, Nephew described the ceremony:

> [T]here was a — some kind of a person, a monk, they said, in kind of an orange cape who was

> chanting all of the time, and at certain points when they thought the metal content had been suitably adjusted, they undertook some ceremonial symbolic gestures of putting in artifacts [such as manuscripts, dogwood twigs, and lotus blooms] into the molten metal.

J.A. at 87 (Nephew Dep.). Nephew also testified that he was told that the ceremony was a cultural tradition that was necessary to impart "soul" to the bell. At one point during the ceremony, he was told to pray to whatever God he wished.[2] Once the bell arrived in Oak Ridge, the Foundation arranged for a University of Tennessee professor and architect to design a pavilion to house it. The pavilion, a triangular structure made of oak wood and covered by a copper roof, incorporates both Eastern and Western architectural styles and is described as influenced by the design of renowned architect Frank Lloyd Wright.

The City of Oak Ridge accepted ownership of the bell and pavilion. The display was permanently installed in the Alvin K. Bissell Park, and a dedication ceremony was held in May 1996, during which a number of Oak Ridge citizens participated in ringing the bell using the special wooden striker.

On February 19, 1998, Robert Brooks filed a complaint in the district court for the Eastern District of Tennessee, alleging that Oak Ridge's acceptance and display of the

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2. Nephew's account of the ceremony was confirmed by Professor Steven Heine, a specialist in East Asian religions who viewed a videotape of the ceremony. Heine also added the opinion that the manuscripts tossed into the metal were prayers.

Friendship Bell violated the Establishment Clause of the U.S. Constitution and Article I, § 3 of the Tennessee Constitution. Oak Ridge moved for summary judgment, and the district court granted the motion, concluding that the Friendship Bell display was constitutional under the test laid out by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and under Tennessee law. This timely appeal followed.

II. ANALYSIS

A. The Federal Constitutional Challenge

We review de novo the district court's grant of summary judgment. *See Granzeier v. Middleton*, 173 F.3d 568, 572 (6th Cir. 1999). In evaluating Establishment Clause challenges to governmental actions, we apply the test articulated by the Supreme Court in *Lemon v. Kurtzman*. In order to pass Establishment Clause muster, a statute or governmental practice must have a secular purpose; its primary effect must be neither to advance nor to inhibit religion; and it must not foster excessive governmental entanglement with religion. *See Lemon*, 403 U.S. at 612-13. When evaluating the "effects" prong of the *Lemon* test, this court applies the endorsement test, which was embraced by the Supreme Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Under the endorsement test, "this [c]ourt considers whether a reasonable observer would conclude that the government endorses religion by allowing the practice in question." *Hawley v. City of Cleveland*, 24 F.3d 814, 822 (6th Cir. 1994). Thus, the endorsement test is particularly concerned with whether governmental practices create a "symbolic union" of church and state. *Agostini v. Felton*, 521 U.S. 203, 220-23, 227 (1997).

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As a threshold matter, however, we must first consider whether the Friendship Bell is a religious symbol at all; if the bell is not actually associated with Buddhism, its display cannot convey the message that the government endorses Buddhism. *See Alvarado v. City of San Jose*, 94 F.3d 1223, 1226-27 (9th Cir. 1996); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 687 (7th Cir. 1994). We conclude that, although the bell has secular significance in Japanese culture, it also carries strong Buddhist connotations and therefore qualifies as a religious symbol for the purpose of Establishment Clause analysis.

In order to explicate the religious significance of the bell, Brooks offered the affidavit of Steven Heine, a professor of Religious Studies at Florida International University who specializes in East Asian religions. Heine testified that bells such as the one in this case are used in Buddhist monasteries, not only in Japan but also in India and China, to regulate the lives of Buddhist monks, marking the time for prayer, meals, and other daily activities. Indeed, such bells were at one time required items in all monasteries. Heine also noted that the Friendship Bell's 108 knobs are connected to the traditional Japanese practice of ringing the Buddhist temple bell 108 times on New Year's Eve, to atone for the 108 sins or shortcomings of mankind.[3] Heine also testified that "[t]he

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3. Similarly, the *Encyclopedia of Religion* explains:

> Another popular Buddhist ritual is the New Year service. . . . At midnight the temple gongs are struck 108 times, signifying the 108 kinds of blind passions . . . that must be purified in the coming year. . . .

(Cont'd)

sound of the bell is a kind of mantra or a chant, which has the kind of sound quality that conveys the unity of the Cosmos, or in this case, the oneness of the Buddha." J.A. at 144 (Heine Aff.). Finally, Heine observed that the bell is strongly associated with Buddhist monasteries, in that the shape of a bell is used to indicate a Buddhist temple on a map, much as crosses indicate Christian churches, and souvenir bells are often sold at or near Buddhist temples.

Additional religious connotations are imputed to the bell by other sources.[4] One author opines, for example, that the deep, vibrating sound of the bell echoes "the peculiar mood

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(Cont'd)

> Although Shintō in origin and nature, [the bell ringing] has become part of the Buddhist tradition, and in the temples it remains the first important ritual of the New Year. The service is held to express gratitude for the past year and to resolve to walk the Buddhist path in the coming year. It includes prayers for good health, success, and long life.

15 THE ENCYCLOPEDIA OF RELIGION 470 (Mircea Eliade ed., 1987).

4. We note that, although the plaintiff bears the burden of proof in this case, this court need not refer to the parties' evidentiary submissions alone in its Establishment Clause analysis. The Supreme Court has routinely referred to secondary sources in order to determine whether a religious symbol constitutes a governmental endorsement of religion, because this question is not merely one of historical fact, but rather "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring); *see also Allegheny*, 492 U.S. at 614 n.60 (Opinion of Blackmun, J.).

of 'emptiness' which is the goal of meditative Buddhist mysticism" and was believed to reach beyond the earthly realm, "even to purgatory where the sound comforted the suffering and kept alive their hope that they, too, might finally travel the path to salvation." DIETRICH SECKEL, BUDDHIST ART OF EAST ASIA 170-71 (Ulrich Mammitzsch trans., 1989). Furthermore, the bell tower's placement in the temple, along with other auxiliary structures, surrounding the temple's main building has been said to symbolize "the communion of saints around the central Buddha." M. ANESAKI, BUDDHIST ART IN ITS RELATION TO BUDDHIST IDEALS 20-21 (1915). Thus, although the Buddhist bells are also cultural artifacts often admired for their artistic quality, *see, e.g.*, H. HACKMANN, BUDDHISM AS A RELIGION: ITS HISTORICAL DEVELOPMENT AND ITS PRESENT CONDITIONS 275-76 (1910), the bells are clearly tied to the Buddhist religion as ritual implements invested with symbolic significance.[5] We therefore find it appropriate to apply the *Lemon* test to Oak Ridge's display of the Friendship Bell.

Applying the first prong of the *Lemon* test, we have little difficulty in concluding that Oak Ridge's purpose in adopting the Friendship Bell was secular. Near the time of the display's installation, Oak Ridge adopted a formal statement of purpose regarding the Friendship Bell. That statement

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5. Brooks suggests that the bell is such an important symbol of Buddhism that it is analogous to the crucifix in Christianity. As our discussion demonstrates, we believe that this assertion is exaggerated. Rather, it seems that Buddha images would occupy this position of primary importance. *See, e.g.*, HEINRICH DUMOULIN, UNDERSTANDING BUDDHISM 143 (1994); 15 ENCYCLOPEDIA OF RELIGION, *supra*, at 468.

articulated two reasons for displaying the bell: first, "[t]o celebrate the past fifty years of growing friendship and peace with Japan," and second, "[t]o express for the future the profound longing and commitment to work for freedom, well-being, justice, and peace for all the people of the world." J.A. at 62 (Friendship Bell Statement of Purpose). These purposes are echoed in the language of the explanatory plaque that accompanies the bell display. "Unless it seems to be a sham, . . . the government's assertion of a legitimate secular purpose is entitled to deference." *Chaudhuri v. State of Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998). We have no reason to believe that Oak Ridge's asserted purposes were a sham. Brooks suggests that the bell was intended in part to symbolize atonement to Japan for Oak Ridge's role in World War II, and that this purpose is tantamount to a religious purpose, because the bombing of Hiroshima has acquired a religious significance for many people.[6] We decline to read the Establishment Clause so broadly. We believe that the Establishment Clause regulates governmental conduct involving religion only, and not the official expression of sentiments that may have religious counterparts, such as sorrow and repentance, toward historical events like the bombing of Hiroshima and Nagasaki. *See Alvarado*, 94 F.3d at 1232.

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6. To support his theory, Brooks points to local newspaper articles allegedly expounding, in connection with the Friendship Bell, upon the themes of atonement for, and "sanctification" of, the bombing of Hiroshima. These articles were extensively discussed in Brooks's materials but were not actually included in the record and are not before this court.

Appendix A

We next consider whether the bell had the impermissible effect of endorsing religion. In making this determination, "[b]oth the content and the context of the religious display must be analyzed, and, the constitutionality of a display's effect must be judged according to the standard of a **reasonable** observer." *Kunselman v. Western Reserve Local Sch. Dist.*, 70 F.3d 931, 932 (6th Cir. 1995) (emphasis in original). We hold that the reasonable observer would not understand the Friendship Bell display, in context, to convey the message that the government of Oak Ridge endorses Buddhism. We believe that the plaque explaining the secular meaning of the display helps to negate any inference of endorsement that might otherwise arise. *See ACLU v. Wilkinson*, 895 F.2d 1098, 1103-04 (6th Cir. 1990). The primarily secular images and words inscribed on the bell's exterior would have a similar effect. Furthermore, we assume that the reasonable observer would know about the bell casting ceremony, as well as about the history of the bell's adoption as a celebratory display for Oak Ridge's fiftieth birthday and the city's official statement of secular purpose to commemorate Oak Ridge's historic connection to Japan and to express a desire for international peace and friendship. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring in part and concurring in judgment) (taking an expansive view of the reasonable observer's knowledge); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1550 & n.7 (6th Cir. 1992) (en banc) (same). Although the religious aspects of the bell and its casting ceremony remain troubling, on balance we believe that the reasonable observer would determine that the City of Oak Ridge intended to endorse peace and friendship with Japan,

not the Buddhist religion, by adopting and displaying the Friendship Bell. Furthermore, the newspaper articles written by private individuals allegedly imputing quasi-religious (but not particularly or uniquely Buddhist) significance to the bell would not, we believe, change the reasonable observer's understanding of whether the government was endorsing Buddhism. We therefore hold that the Friendship Bell display, in context, does not have the effect of endorsing religion.

Similarly, we find no impermissible governmental entanglement with religion. "[T]o assess entanglement, we have looked to 'the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.' " *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385 (6th Cir. 1999) (quoting *Agostini*, 521 U.S. at 232-33) (alteration in original). Political divisiveness may be some evidence of excessive entanglement, *see Lemon*, 403 U.S. at 622-23, but divisiveness alone, in the absence of administrative entanglement, is not enough to render a practice unconstitutional, *see ACLU v. City of Birmingham*, 791 F.2d 1561, 1565 (6th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986). Brooks points to several factors as demonstrating entanglement: the city's ownership and maintenance of the bell; the alleged controversy in Oak Ridge over the adoption of the Friendship Bell; and the adoption of an ordinance regulating the times during which the bell may be rung. Since the city did not need to interact, nor did it interact, with any religious group as a result of its ownership and maintenance of the bell, the plaintiff cannot demonstrate entanglement

on this basis. *See Birmingham*, 791 F.2d at 1565-66 ("Since the city owned the creche and no church or other religious entity was involved in the annual display, there was no evidence of entanglement."). Moreover, there is no evidence that the controversy over the adoption of the Friendship Bell concerned the bell's religious, as opposed to its political, significance.[7] Finally, although Brooks hypothesizes that the ordinance regulating the ringing of the bell was a reaction to a perceived danger that the bell would be used for Buddhist purposes, the record indicates that the ordinance instead reflected concerns about noise and about the political controversy over the bell. Therefore, Oak Ridge's display of the bell does not entail impermissible entanglement with religion.

B. The State Constitutional Challenge

Article I, § 3 of the Tennessee Constitution provides:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

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7. According to at least one witness, a number of Oak Ridge citizens expressed concern that the Friendship Bell improperly represented an "apology" to Japan for the bombing of Hiroshima and Nagasaki.

The Tennessee courts have applied the *Lemon* and endorsement tests to determine whether governmental conduct gives an impermissible preference to religion under Article I, § 3. *See Steele v. Waters*, 527 S.W.2d 72, 73-74 (Tenn. 1975); *Martin v. Beer Bd.*, 908 S.W.2d 941, 951 (Tenn. Ct. App. 1995). Although the Tennessee Constitution guarantees a stronger free exercise right than the federal Constitution, *see Martin*, 908 S.W.2d at 946, Brooks has pointed to no judicial decisions construing the Tennessee Constitution's Article I, § 3 as providing for greater separation of church and state than the federal Establishment Clause. We therefore hold, for the reasons discussed in Part II.A., that Oak Ridge's display of the Friendship Bell does not violate Article I, § 3 of the Tennessee Constitution.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Appendix A

CONCURRENCE

ALAN E. NORRIS, Circuit Judge, concurring. Although I concur in the result reached by the majority, I write separately to express my view that plaintiff has failed to establish that the Oak Ridge bell is, in fact, a Buddhist religious symbol. The conflicting evidence in the record also supports a conclusion that the bell is a Japanese cultural object, or that any resemblance to a Buddhist bell is not substantial enough to give the Oak Ridge bell itself religious significance. I therefore doubt whether a *Lemon* analysis is even necessary in this situation. In any case, as the majority opinion notes, the Oak Ridge bell passes the *Lemon* test, and therefore does not violate the Establishment Clause even if it were shown to be a religious symbol.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE DATED AND FILED MARCH 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:98-cv-99

ROBERT BROOKS,

Plaintiff

v.

CITY OF OAK RIDGE,

Defendant

MEMORANDUM OPINION

This is an action brought pursuant to 42 U.S.C. § 1983 by a citizen of Oak Ridge, Tennessee, claiming that a "Friendship Bell" erected in an Oak Ridge public park violates the Establishment Clause of the First Amendment to the United States Constitution and the Freedom of Religion Clause of the Tennessee Constitution. Currently pending are cross-motions for summary judgment [Court Files #6 and #18]. For the reasons that follow, defendant's motion for summary judgment will be granted, plaintiff's motion for summary judgment will be denied, and this action will be dismissed.

Appendix B

I.

Factual Background

In the late 1980s, approximately 50 citizens of Oak Ridge, Tennessee, formed a non-profit corporation called the Oak Ridge Community Foundation primarily to develop a plan for the celebration of Oak Ridge's 50th birthday. The Foundation solicited proposals from the community for an appropriate commemorative project. The Foundation considered several proposals and ultimately selected one entitled the "Friendship Bell," a proposal submitted by a local Japanese-American citizen. The citizen who submitted the proposal was not a Buddhist. The proposal called for the casting of a large solid bronze bell in Japan, to be followed by its placement in a pavilion in Oak Ridge. Among other things to be etched onto the outside of the proposed bell were pictures depicting natural characteristics of both Tennessee and Japan, including the official flowers, trees and birds of each. Another non-Buddhist Oak Ridge citizen designed the pictures that were to be depicted on the bell.

After the project was selected, the Foundation established a "Bell Committee." The Committee solicited financial contributions and donations of material and labor for the project. The committee also printed a brochure to publicize the project and solicit contributions. The brochure set forth the Foundation's goals and purposes as follows:

> * The Project exemplifies the spirit of the City's celebration theme, *Born of War, Living for Peace, Growing Through Science.*

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* The Project commemorates and honors those dedicated workers of the Manhattan Project, 1942-1946, whose unprecedented human, technological, and scientific contributions ended the tragedy of World War II and formed a basis for strength that later helped end the Cold War, as well. Because of Oak Ridge's role in the Manhattan Project, the bell incorporates key dates that reflect the history that was made more than 50 years ago — from Pearl Harbor, through Hiroshima and Nagasaki, to V-J Day and the end of World War II.

* The bell is an expression of the hope for everlasting peace, friendship, and understanding among all people of the world. In keeping with its message promoting global good will and cooperation, the Foundation specifically chose "International Friendship Bell" as the project title. It has been supported principally by private donations from Oak Ridgers, as well as contributors from the United States, Japan and other countries. More than $200,000 in contributions and in-kind services made the project possible.

* Although international in its message, the bell specifically incorporates the Oak Ridge — Japan historical link because the initial concept was suggested by Oak Ridger and Japanese-American Shigeko Uppuluri and her late husband Ram. It is historically relevant to our

community, and the project has been supported strongly in both countries.

There is no evidence that religious symbolism, of any type, was ever mentioned by the Foundation members. Neither the Foundation nor the Bell Committee received any input from religious organizations concerning the content, message or construction of the bell project. As far as the Foundation or the committee were aware, there were no Buddhist temples or churches in Oak Ridge, nor any practicing Buddhists. There is no evidence that over the last five years, during the bell's design and construction, anyone other than the plaintiff has ever made any public association between the bell and Buddhism.

After the Foundation received approximately $80,000 in contributions, there were sufficient funds to pay for the casting of the bell in Japan. Several members of the Bell Committee and other Oak Ridgers apparently made a trip to Japan to participate in a ceremony at which the casting of the bell was begun. The solid bronze bell is six feet seven inches tall, four and a half feet in diameter, and weighs four tons. A Buddhist monk presided over the ceremony, during which pieces of parchment with Buddhist prayers written on them, as well as various plant parts, some of which were brought from East Tennessee, were cast into the molten metal. One of the members of the Oak Ridge City Council who attended the ceremony, Ed Nephew, understood that the purpose of the ceremony was a Japanese cultural tradition necessary to give the bell "soul."

The bell was shipped free from Japan to Oak Ridge courtesy of the Honda Corporation and an Oak Ridge

corporation. The committee then began soliciting funds for the construction of a bell pavilion. The structure to house the bell was designed by a UT professor and architect. The Bell Committee selected his proposal because it was said to be a unique work, incorporating the architectural and cultural designs of both West and East. The triangular structure, made of Tennessee white oak beams and covered by a copper roof does not appear to closely resemble either a Japanese temple or an East Tennessee church.

The Foundation and Bell Committee requested that the City of Oak Ridge provide an appropriate site for the bell. The City agreed to accept ownership of the bell and pavilion and allowed its placement in A.K. Bissell Park. This park has a large open area with walking trails. It is several hundred yards away from the Oak Ridge Civic Center/Library Complex.

Around the time that the City accepted ownership of the bell, it became a topic of discussion at city council meetings. Mr. Nephew testified that in his mind the purpose of the bell was to support international peace and friendship. Nephew testified that he felt the bell was symbolic as bringing former enemies together rather than perpetuating hatred.

The only persons who opposed the project before the city council were those who felt that the bell in some way represented an apology to a defeated former enemy. Mr. Nephew testified that the only person he recalled as having expressed an opinion about any "religious character" of the bell was a past chairman of the Bell Committee, Dr. Alvin Weinberg. Dr. Weinberg wrote a letter to the editor of the

local paper expressing his view that the Friendship Bell should develop some "transcendent religious character" to sanctify the dropping of the atomic bombs created in Oak Ridge and the cessation of future use of such devices. Dr. Weinberg's views were never adopted by the Bell Committee, the Foundation, or the Oak Ridge City Council. The Oak Ridge City Council adopted a Statement of Purpose in which it described the bell as serving two important community purposes. The first was "[t]o celebrate the past 50 years of growing friendship and peace with Japan." The second was said "[t]o express for the future the profound longing and commitment to work for freedom, well-being, justice and peace for all the people of the world." Although a number of city council members were deposed by the plaintiff, none expressed any awareness of any connection between the bell project and Buddhism, nor was any aware the city had ever done anything to declare a preference for or against any particular religion.

The bell was finally installed in its bell house in the Alvin K. Bissell Park and formally dedicated in May 1996. The plaintiff lives close to Bissell Park and frequently visits it. He claims that the bell is an important or significant Buddhist religious symbol or artifact. Plaintiff points out that the bell has the distinctive size and shape of a traditional Buddhist temple bell. He claims that like other Buddhist temple bells, it is a single bronze casting, weighing almost four tons, and being 6.7 feet in height, with a diameter of 4.8 feet. He points out that the upper third portion of the bell contains what is commonly referred to as "nipple relief," which is also another common characteristic of the Japanese Buddhist temple bell. In addition, the bell is rung by external percussion from a

mallet or palm log and contains no clapper, again another traditional and common feature of a Japanese Buddhist temple bell. He points out that the bell was cast by a well-known religious bell maker in Kyoto, Japan, in a ceremony presided over by a Buddhist monk. Plaintiff claims that he recognizes the bell as a significant Buddhist religious object or artifact because of his own experiences in the military in the Pacific during World War II. He has also submitted the affidavit of Steven Heine, an expert in East Asian and Comparative Religions, who states that a reasonable and knowledgeable observer would conclude that the bell is a Japanese Buddhist Bell.

Next to the walkway leading up to the bell is a plaque which reads as follows:

FRIENDSHIP BELL

> This bronze bell was designed in Oak Ridge and cast in Japan in 1993 to serve as a symbol of the bonds of friendship and mutual regard that have developed between Oak Ridge and Japan over the past 50 years. . . . friendship made so much more meaningful because of the terrible conflict of World War II which Oak Ridge played such a significant role in ending. This bell further serves as a symbol of our mutual longing and pledge to work for freedom, well-being, justice, and peace for all the people of the world in the years to come.
>
> Given to the people of Oak Ridge on the occasion of their 50th birthday by the Oak Ridge

Appendix B

Community Foundation and friends in the United States, Japan and other nations.

1996

Oak Ridge, Tennessee

Born of War, Living for Peace,
Growing through Science

Plaintiff contends that the City of Oak Ridge has violated the Establishment Clause of the United States Constitution and the analogous clause of the Tennessee Constitution by accepting the bell as a gift and permitting its permanent placement in Bissell Park.

II.

Summary Judgment Standards

Pursuant to Rule 56, summary judgment shall be rendered when requested if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. It is the burden of the party seeking summary judgment to show the court that, under uncontradicted facts, the moving party is entitled to judgment as a matter of law. Summary judgment is intended to provide a quick, inexpensive means of resolving issues as to which there is no dispute regarding the material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In assessing the validity of

a summary judgment motion, the court views the pleadings, depositions, answers to interrogatories, admissions, and competent affidavits in a light most favorable to the opponent of the motion. However, an opponent to a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but must set forth through competent and material evidence specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.*

III.

The Establishment Clause

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *U.S. Const. Amend. I.* The Establishment Clause requires government neutrality with respect to religion. *Abington School District v. Schempp*, 374 U.S. 203, 215 (1963). It was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (quoting *Walz v. Tax Commissioner*, 397 U.S. 664, 668 (1970)). According to the test set out in *Lemon*, for a challenged state action to pass constitutional muster, it must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement with religion. 403 U.S. at 612-13. Governmental action violates the Establishment Clause if it

fails to meet any of these three criteria. *Stone v. Graham*, 449 U.S. 39, 40-41 (1981).

In *Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), a majority of the Supreme Court noted that, in determining whether the principal or primary effect of the state action advances or inhibits religion, one must adopt the standard of a "reasonable observer." 492 U.S. at 620. The United States Court of Appeals for the Sixth Circuit has observed the following with respect to that test:

> Thus, in order to decide whether or not [the state] has violated the Establishment Clause, we must adopt the perspective of a reasonable observer. We wish to emphasize that the endorsement test creates an objective standard, similar to the "reasonable man" standard of tort law or the "reasonable person knowing all the relevant facts" for judges' judicial disqualification under 28 U.S.C. § 455. *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980). Accordingly, we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the state] endorses religion. Instead, we ask whether *the* reasonable observer *would* conclude that [the state] endorses religion by allowing [the questioned] display.

Americans United v. City of Grand Rapids, 980 F.2d 1538, 1543-44 (6th Cir. 1992). In attempting to define the

"reasonable observer," the court must consider all of the facts presented in each case. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Conner, J, concurring).

IV.

Analysis

Upon a careful review of the record, the court finds that as a matter of law the defendant has satisfied all three prongs of the *Lemon* test. First, the plaintiff has not alleged that the purpose of the "Friendship Bell" is exclusively religious. Even if he had, there is a clear secular purpose. As the plaque at the site of the bell states, it serves as a symbol of the bonds of friendship and mutual regard that have developed between Oak Ridge and Japan over the past 50 years. Also, as the Oak Ridge City Council's Statement of Purpose states, it serves as a continual reminder of the dedication to put science, technology, and humanity to work in the future along with nations everywhere to achieve world-wide peace. Accordingly, I hold that the "Friendship Bell" has a secular purpose.

With respect to the second prong of the *Lemon* test, government action is proper if its primary effect is neither to advance nor inhibit religion. Under this prong, the court must ask whether the reasonable observer would conclude that Oak Ridge endorses religion by allowing the Friendship Bell's display. Under this test, the court must consider all

the relevant facts. Upon reviewing these facts, I conclude that reasonable viewers would not understand the purpose of the bell to be either an endorsement or disapproval of any religion. First, there is no evidence that any person, other than the plaintiff and his expert, who has visited the site of the bell has connected it with the Buddhist religion. Nor would anyone reading the plaque construe the bell as symbolizing anything other than bonds of friendship between the City of Oak Ridge and Japan. The bell itself is covered with symbols, *i.e.*, birds, plants, etc., indigenous to Tennessee and Japan. It also contains various important dates in the history of World War II such as the bombings of Hiroshima and Nagasaki and V-J Day. The bell is housed in a structure that cannot be said to reasonably be construed to be a Buddhist structure. Moreover, it is clear that the "Friendship Bell" was paid for solely out of private funds. Finally, a reasonable observer would certainly be aware that Buddhism is not a predominant religion in East Tennessee, assuming that it exists here at all. There would be no discernible reason for the City Council of Oak Ridge to endorse Buddhism. The court concludes that the bell satisfies the endorsement test.

Finally, the court concludes that plaintiff has failed to come forward with any evidence that the City of Oak Ridge, by accepting the gift of the bell, has become excessively entangled with religion. Again, there is no evidence that anyone on the City Council or anyone in Oak Ridge other than the plaintiff even knows that the bell may have some connection to Buddhism. Certainly there is no evidence that the City has done anything other than accept the bell as a gift. The bell simply does not suggest that the City of Oak

Appendix B

Ridge has any entanglement with Buddhism or any other religion.

V.

Plaintiff's State Constitutional Claim

Article 1, Section 3 of the Tennessee Constitution provides as follows:

> *Freedom of Worship.* — that all men having natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall be given, by law, to any religious establishment or mode of worship.

Article 1, Section 3 has been described by the Tennessee Supreme Court as "practically synonymous" with the First Amendment, except that it has been construed as substantially stronger with respect to that part of the provision which is analogous to the Free Exercise Clause. *See Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956). Substantively, the Tennessee courts have adopted the three-part test announced in *Lemon*, supplemented by Justice O'Connor's endorsement inquiry from *Allegheny County*. *Martin v. Beer Board for City of Dixon*, 908 S.W.2d 941, 950-51 (Tenn. Ct. App. 1995). For the same reasons set out above with respect

to the Establishment Clause of the U.S. Constitution, the placement of the Friendship Bell in A.K. Bissell Park is likewise constitutional under the Tennessee Constitution.

VI.

Conclusion

In light of the foregoing, defendant's motion for summary judgment [Court File #6] is GRANTED, plaintiff's motion for summary judgment [Court File #18] is DENIED, and this action is hereby DISMISSED.

Order accordingly.

s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 14, 2000

99-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT BROOKS,

Plaintiff-Appellant,

v.

CITY OF OAK RIDGE,

Defendant-Appellee.

ORDER

BEFORE: NORRIS, MOORE, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX D — GUEST COLUMN OF ALVIN N. WEINBERG, *OAK RIDGER* DATED OCTOBER 18, 1991

After lecturing to the RERF staff, I was taken by my host to visit the Hiroshima Peace Park. This is a 100-acre park located at ground zero of the exploding Hiroshima bomb. The only original vestige of the bomb is the ruins of the commercial display building which was directly below the nuclear blast.

The park is beautifully laid out with a large museum devoted to recording the events of August 6, 1945. In addition there are monuments, well-tended gardens and ponds, and a large Japanese bell.

Visitors ring the bell by banging it with a ten-foot, horizontal wooden pole that is suspended by ropes.

The day we were there, perhaps 5,000 visitors were at the park, and the deep reverberations of the bell could be heard whenever a visitor had the courage — and strength — to hit the bell with the clapper pole. I took my turn, but I fear my sound was a bit puny compared with the sounds produced by some of the younger visitors.

I was told by my host that the Hiroshima Peace Park attracts some 100,000 visitors from all over the world on each August 6 — that Hiroshima

becomes sort of a shrine (perhaps like Bethlehem or Mecca) on the anniversary of the great killing.

And even on an ordinary day, the whole place has a sort of religious feel. There are thousands of paper birds left by the many visitors, just as at other Japanese shrines. People walk about quietly and they talk in subdued tones — especially when they stand before the mound that marks the mass grave of 10,000 victims.

Could it be that the awful event of August 6, 1945, is in fact being transformed into a religious event? Is Hiroshima becoming sanctified?

I had speculated on this possibility a few years ago in an article that I wrote for the Bulletin of the Atomic Scientists. My point was that nuclear weapons are so horrible that they must not be used — ever. Deterrence has worked, the Cold War is over, and for almost 50 years, there has been no use of nuclear weapons.

We in Oak Ridge are justifiably proud of the role we have played in keeping the peace, but the knowledge of making bombs will never die. We must contemplate a world 50, 100, 1,000 years from now that will live with the knowledge. How can we guarantee that the hydrogen bombs like the ones we make in Oak Ridge won't be used during all those years?

Appendix D

I suggested that mankind must surround the use of nuclear bombs with taboos that are of such strength, such depth, such force as to make the use or even illicit possession of nuclear weapons a heinous crime against humanity, punishable by death.

To establish taboos of such power that last over a millennia means that somehow these taboos must acquire religious significance, for only religious happenings remain in humanity's consciousness for millennia. Terrible historical events, occurring at the right time, do acquire a religious symbolism — for example, the crucifixion or much more recently, the Jewish Holocaust, which is now observed in Jewish liturgy.

So in this sense I believe the world will be better off if Hiroshima becomes sanctified; if August 6, 1945, passes into the world's consciousness as a universal religious happening — one around which powerful religious taboos are erected.

. . . [O]nly a horrible event — one in which 100,000 perish — can effect our emotions deeply enough to allow it to become the basis for a religious taboo. . . .

What does all this have to do with the Oak Ridge Friendship Bell? If we believe that nuclear weapons must be tabooed, and that such taboos to be everlasting must achieve a mythic or

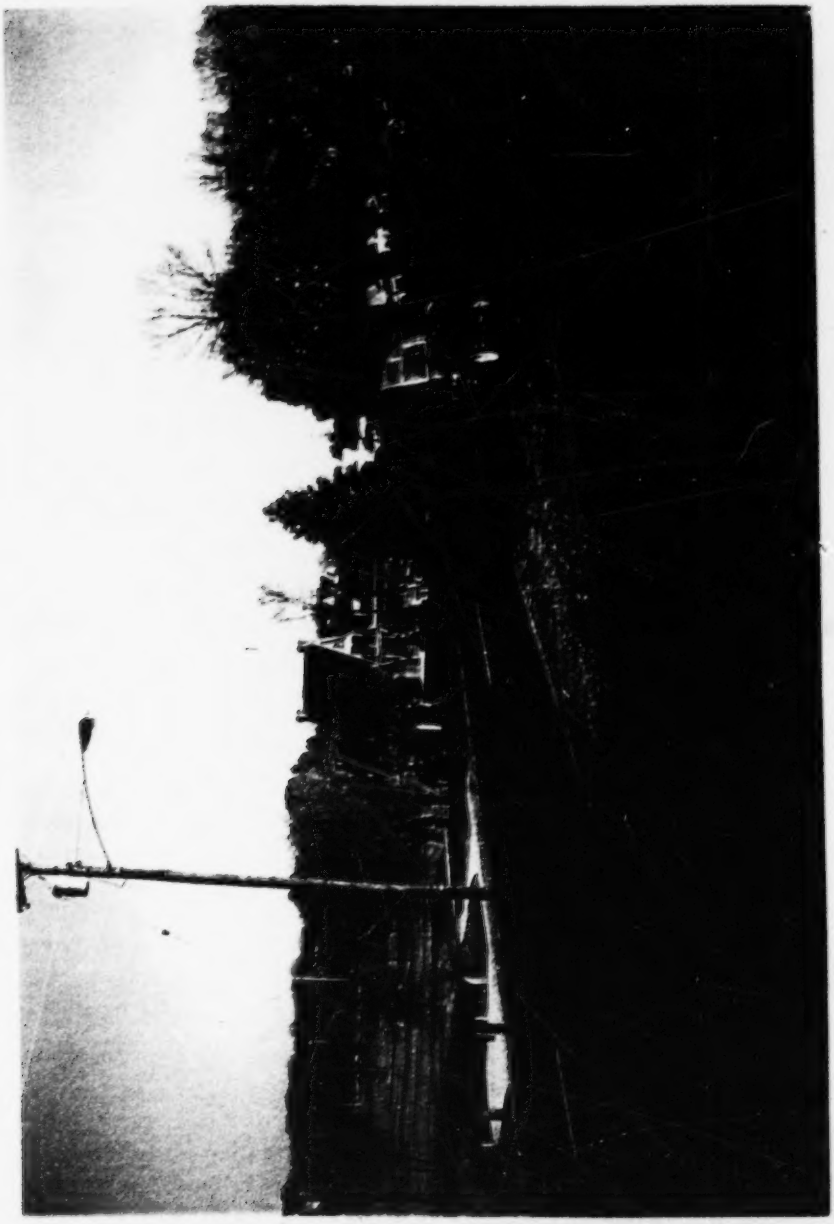
religious status, then I think Oak Ridge as well as Hiroshima should be sanctified. We produced the uranium-235 that went into the Hiroshima bomb.

I now believe the use of the bomb at Hiroshima was justified both because it ended the war, and because it made August 6, 1945, a day that history and religion will never forget. I therefore think it is very appropriate that the shrine that exists at Hiroshima where the bomb was used be replicated at Oak Ridge.

The Oak Ridge Friendship Bell ought to acquire the same kind of transcendental, religious character as has the Hiroshima bell. It will forever symbolize Oak Ridge's recognition that the nuclear holocaust at Hiroshima should never be repeated.

Oak Ridger, 10/18/91, guest column of Alvin N. Weinberg, former Director of Oak Ridge National Laboratory, and Honorary Chairman of the City's International Friendship Bell Committee. (R.18, Response to Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment, 3/1/99, Apx.139b-d).

APPENDIX E — PHOTOGRAPHS OF NEW YEAR SERVICE, OAK RIDGE, TENNESSEE, DECEMBER 31, 1999



Appendix E